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## MOHD ZAIDY ADENAN

**v.**

## PP

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HIGH COURT MALAYA, PETALING JAYA
SU GEOK YIAM J
[CRIMINAL APPEAL NO: 42S-9A-2009]
15 OCTOBER 2011

C ***CRIMINAL LAW:*** *Penal Code - Section 394 - Robbery - Whether failure to call material witnesses caused serious gaps in prosecution case - Whether trial judge conducted maximum evaluation on prosecution's case - Whether prima facie case established - Whether burden of proof discharged*

D ***CRIMINAL PROCEDURE:*** *Appeal - Appeal against conviction and sentence - Offence under s. 394 Penal Code - Whether there were serious gaps in prosecution case - Whether trial judge conducted maximum evaluation on prosecution's case - Whether prosecution established prima facie case - Whether prosecution discharged burden of proof - Whether* E *sentence manifestly excessive*

The appellant was charged under s. 394 of the Penal Code for voluntarily causing hurt to one Mubarak bin Amanullah Khan ('the complainant') whilst attempting to commit a robbery on the F complainant at a sundry shop. It was the prosecution's case that the appellant had brandished a parang to PW1, the owner of the sundry shop. PW1 grappled with the appellant and subsequently PW4, PW1's brother-in-law, came to his assistance. In the course of the fight, both PW1 and PW4 injured their fingers. However, G the appellant was subsequently arrested by PW1 with the help of a few passers-by and handed over to the police. The first trial judge, after hearing the evidence of the prosecution, was satisfied that the prosecution had successfully proven a *prima facie* case against the appellant and ordered the appellant to enter his H defence. However, the case was continued by the second trial judge who heard the defence case. At the end of the defence case, the second trial judge held that the defence had failed to cast a doubt in the prosecution case and proceeded to find the appellant guilty, convicted and sentenced him to eight years I imprisonment and four strokes of whip. Hence this appeal by the appellant against the conviction and sentence.

**Held (allowing appeal; quashing conviction and acquitting and discharging appellant):**

**(1)** Although it is the prerogative of the prosecution to call any number of witnesses, the prosecution must ensure that all the material witnesses are called because the burden to prove the case beyond all reasonable doubt rests throughout on the prosecution. Where the prosecution had failed to adduce sufficient evidence to discharge its burden of proof the benefit of the doubt must be given to the accused. Based on the evidence, there were serious gaps in the prosecution case arising from the non-calling of four to five material witnesses who were essential for the complete narration or unfolding of the prosecution case. (paras 38 & 41)

**(2)** The judge, at the close of the prosecution case must conduct a maximum and positive evaluation of the evidence adduced by the prosecution to ensure that there was credible evidence to prove each and every ingredient of the offence. In the instant case, had the first trial judge scrutinised the prosecution's case carefully, she would not have called the appellant to enter his defence. It was quite clear that the prosecution had failed to prove on a *prima facie* basis that the appellant had committed the offence as specified in the charge. (paras 39 & 64)

**(3)** There was no evidence that the appellant had demanded that PW1 hand over any movable property belonging to PW1 such as money or jewellery or other chattels as is mandated by s. 378 of the Penal Code. There was also no evidence that in making the demand the appellant had caused or attempted to cause to PW1 death or hurt or wrongful restraint or fear of instant death or instant hurt or instant wrongful restraint as is mandated by s. 394 of the Penal Code. (paras 65 & 66)

**(4)** The defence version could be believed and accepted taking into account the facts and circumstances of the case. Even if the second trial judge did not believe the appellant's version, he ought to follow and apply the principle of law as enunciated in the case of *Mat v. PP* and consider whether the defence, *albeit* false had casted a doubt on the prosecution case. There was a misdirection in the instant case, which had occasioned in miscarriage of justice.

**(5)** The appellants appeal had merits as there were substantial and compelling reasons that the first trial judge had made erroneous findings of primary facts and that the decisions of both the learned trial judges were erroneous and ought to be set aside. (para 41)

**(6)** The sentence meted out by the trial judge was manifestly excessive. The appellant was a first time offender and had a good record. Further, he himself had suffered injuries more serious than those suffered by PW1 and PW4. Further, it was PW1 and PW4 themselves who had held onto the sharp blade of the parang when there was no evidence to show that they were under any reasonable apprehension that they had to do that immediately in order to protect themselves from being injured by the appellant. (para 79)

**Case(s) referred to:**
*Balachandran v. PP [2005] 1 CLJ 85 FC* ***(refd)***
*Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC* ***(refd)***
*Mat v. PP [1963] 1 LNS 82 HC* ***(refd)***
*Muthusamy v. PP [1947] 1 LNS 71 HC* ***(refd)***
*PP v. Loo Choon Fatt [1976] 1 LNS 102 HC* ***(refd)***
*PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
*PP v. Muthu Subramaniam Seeniservai [2001] 7 CLJ 236 HC* ***(refd)***
*R v. Kenneth John Ball [1951] 35 Cr App 164* ***(refd)***
*Sia Soon Suan v. PP [1965] 1 LNS 165 FC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 180(4)
Evidence Act 1950, s. 114(g)
Penal Code ss. 378, 394,

*For the appellant - Justin Morais; M/s Justin Morais & Co*
*For the respondent - Mohamed Mustaffa P Kunyalam; DPP*

*Reported by S Barathi*

## JUDGMENT

**Su Geok Yiam J:**

### Background

**[1]** The appellant was charged under s. 394 of the Penal Code ("the PC") with one count of voluntarily causing hurt to one Mubarak bin Amanullah Khan ("the complainant") whilst attempting to commit a robbery on the complainant.

**[2]** The offence was alleged to have been committed by the appellant on 11 April 2003, at about 9.45am ("the material time"), at the "Mubarak" sundry shop at No: 7-G, Jalan SR 7/7, Serdang Raya, Seri Kembangan, in the Petaling district, in the state of Selangor ("the shop").

**[3]** The prosecution called six witnesses in order to prove a *prima facie* case against the appellant. The learned Sessions Court Judge ("the 1st trial judge") who heard the evidence of the six prosecution witnesses ordered the appellant to enter his defence to the charge at the close of the prosecution's case as she was satisfied that the prosecution had succeeded in proving a *prima facie* case against the appellant.

**[4]** Before she could hear the appellant's evidence in support of his defence, however, she was transferred to another position. The 2nd trial judge heard the defence's case and ruled at the close of the defence's case that the defence had failed to cast a doubt in the prosecution's case. She, consequently, found the appellant guilty, convicted him and sentenced him to eight years imprisonment and four strokes of the whip.

**[5]** Being dissatisfied with the conviction and sentence the appellant filed a notice of appeal to the High Court.

## Decision Of This Court

**[6]** Having considered the oral and written submissions of both the parties against the backdrop of the appellant's petition of appeal, the notes of evidence, the grounds of judgment of the 2nd trial judge and the documentary exhibits as contained in the appeal record, this court was satisfied that the appellant's appeal had merits. This court, consequently, allowed the appellant's appeal, set aside the conviction and sentence and, accordingly, acquitted and discharged him.

**[7]** Being dissatisfied with the decision of this court the respondent who is the Public Prosecutor has filed a notice of appeal against the decision of this court.

## Reasons For The Decision Of This Court

**[8]** Below are the reasons for the decision of this court:

**[9]** Firstly, this court was satisfied that the 1st trial judge erred when she held that the prosecution had proved a *prima facie* case against the appellant. Section 180(4) of the Criminal Procedure Code (the "CPC") expressly provides that a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence alleged to have been committed by the appellant which if unrebutted or unexplained would warrant a conviction.

**[10]** Therefore, pursuant to that provision, as the charge stood against the appellant, the prosecution had to prove based on credible evidence that the appellant had done all of the following acts at the material time at the scene of the crime:

(a) The appellant attempted to commit robbery on the complainant;

(b) That in doing so the appellant caused hurt to the complainant; and

(c) That the hurt was caused voluntarily by the appellant on the complainant.

**[11]** This court noted that the evidence which was adduced from six prosecution witnesses to support the charge was, briefly, as follows:

**[12]** At the material time, the appellant was the only customer left in the shop and PW1, the owner of the shop, was standing behind the counter in the shop. The appellant asked PW1 what was the price of a pen. PW1 told the appellant the price of the pen. Suddenly, the appellant unzipped his jacket, took out a "parang", P1, brandished it at PW1 and said "this is a robbery!"

**[13]** The word "parang" is a Malay word which means a long knife in English.

**[14]** PW1 immediately held onto the blade of the parang with his right hand. As a result of his action three of his fingers on his right hand were nearly amputated. This infuriated PW1 who then made up his mind to arrest the appellant in whichever way possible. So PW1 grappled with the appellant who was still holding the parang in his hand in front of the counter in his sundry shop. His act caused the appellant to fall down. PW1 continued to grapple with the appellant.

**[15]** PW1's brother-in-law, PW4, who was having his dinner in the store room of the shop heard a loud sound like the one caused by a heavy object falling on the floor. He rushed out from the store room and saw PW1 quarrelling with the appellant. After that he corrected himself and said he saw PW1 grappling with the appellant. He then went to the assistance of PW1.

**[16]** Initially he did not see the parang that the appellant was holding in his right hand. So he tried to pull the appellant away from PW1 by pulling both the appellant's hands from the appellant's back.

**[17]** The appellant then brandished the parang at PW4. PW4 attempted to catch hold of the appellant's right hand which was holding the parang. He missed and he ended up holding the middle part of the blade of the parang. He tried, unsuccessfully, to wrest the parang from the appellant. He, like PW1, also suffered injury to his hand in that three of his fingers of his right hand were nearly amputated.

**[18]** PW4 became dizzy as a result of the injury to his hand. He let go of the appellant's hand. He saw PW1 going to the counter and taking out an iron pipe to hit the appellant's leg. Before that he saw the appellant and PW1 standing at the counter. He saw that they were still quarrelling. He could not recall what transpired after that.

**[19]** PW1 who had gone to the counter of the shop and had taken out an iron pipe which had been modified with a piece of wire explained that the iron pipe was kept in a secret compartment behind the counter. It was kept there for his use for self-defence purposes since the month of January 2003 when he took over the management of the shop.

**[20]** PW1 admitted that he was not afraid of the appellant who was attempting to rob him with the parang because he could defend himself with the modified iron pipe.

**[21]** PW1 tried unsuccessfully to hit the appellant, presumably on the head, with the modified iron pipe because the appellant was wearing a helmet. He could not remember whether the helmet had a visor. This court noted that the helmet was not produced in court. PW1 also tried unsuccessfully to seize the parang which the appellant was still holding in his hand.

A **[22]** PW1 then held tightly to the appellant using his fingernails. With the help of two or three passers-by, PW1 then succeeded in overpowering the appellant. He then arrested the appellant. They also tied up the appellant and placed the parang which the appellant was holding in his hand on the floor beside the
B appellant.

**[23]** He was able to identify the parang, P1. It was a new parang. It was very sharp because when he held onto the parang three of his fingers were nearly cut off when the appellant pulled
C the parang.

**[24]** At this juncture, when he was about to faint because he had lost a lot of blood, the police came to the shop. They untied the appellant and handcuffed the appellant. They then took the appellant away.
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**[25]** Another brother-in-law of PW1 by the name of Jaheer Husin who was upstairs then came down. He took PW1 and PW4 to the Pantai Medical Centre which is a private hospital (the "hospital") for treatment. Jahir Husin was never called as a
E witness.

**[26]** In the meantime, PW2 who was on duty at the enquiry desk of the Sri Kembangan police station received a telephone call at about 9.30am from a member of the public concerning a
F robbery at the shop.

**[27]** He relayed the information to PW3.

**[28]** PW2 then lodged a police report, Sri Kembangan Report 1840/03, P4 at 10.45am.
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**[29]** PW3 went to the shop. He saw many people outside the shop. Upon entering the shop he saw things scattered about and bloodstains on the floor. PW1 pointed out to him the appellant who was lying injured and unconscious on the floor.
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**[30]** PW1 informed PW3 that the appellant had robbed him. PW1 also informed PW3 that he had suffered injuries to his hand. PW1 also informed PW3 that his worker and his brother-in-law were also injured by the appellant's parang.

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**[31]** PW3 found a parang on the floor beside the appellant. It had bloodstains on it. He also saw a sheath for the parang. He could not remember whether the appellant was still wearing his helmet with a visor. At the same time he said that he saw injuries on the appellant's head.

**[32]** PW3 arranged for the appellant to be brought to the police station. He himself then seized the parang and the sheath and took them to the police station where he lodged a report, Sri Kembangan Report 1841/03, P5. He handed over the parang and the sheath to the Investigating Officer, PW6.

**[33]** In his report, P5, PW3 said that he saw injuries on the appellant's face and head. PW3 also said that PW1 had told him that the appellant had attempted to rob his shop and had injured him, his worker and his brother-in-law.

**[34]** On his arrival at the police station PW3 found that the appellant was still unconscious. So he instructed a police patrol car to send the appellant to the Pusat Kesihatan Sri Kembangan for examination and treatment. Subsequently, the appellant was sent to the Putrajaya Hospital for treatment. Yet PW6 said that he found the appellant conscious when he arrived at the Sri Kembangan police station.

**[35]** PW5, the orthopaedic surgeon who was the doctor on call at the hospital examined and treated PW1 and PW4 at the emergency unit. He found that PW1 was injured on both his hands, his back and his right elbow. He did not give his evidence based on his clinical notes or any other contemporaneous records. Based on his memory and his estimation he said that he treated PW1 who received more than 30 stitches altogether from him. He found that PW4 was injured on his palm and right hand. Based on his memory and his estimation he said he treated PW4 who received 10 to 15 stitches altogether from him.

**[36]** PW5 was of the opinion that the injuries suffered by PW1 and PW5 on their fingers could have been caused by a sharp instrument like the parang, P1. Although PW5 referred to his report, presumably with the permission of the 1st trial judge, during the trial his medical report was never tendered to corroborate his sworn oral testimony.

**[37]** PW4 testified that the police did not record any statement from him. But PW6 contradicted PW4 when he testified that he had recorded a statement from PW4 four days after the offence was alleged to have been committed by the appellant, to wit, on 15 April 2003 at about 12.30pm in his office.

**[38]** This court was of the view that the learned trial judge erred when she failed to appreciate two well established principles of law. The first principle of law is that although it is the prerogative of the prosecution to call any number of witnesses the prosecution must ensure that all the material witnesses are called because the burden to prove the case beyond all reasonable doubt rests throughout on the prosecution. The accused needs to only cast a doubt on the prosecution case. The accused has no burden to prove his innocence. Where the prosecution has failed to adduce sufficient evidence to discharge its burden of proof the benefit of the doubt must be given to the accused.

**[39]** The second principle of law is that at the close of the prosecution's case she must conduct a maximum and positive evaluation of the evidence adduced by the prosecution in order to satisfy herself whether there was credible evidence to prove each and every ingredient of the offence (see *Balachandran v. PP* [2005] 1 CLJ 85).

**[40]** The third principle of law is that the credibility of a witness is primarily for the trial judge. An appellate court should always be slow to disturb a finding of fact arrived at by the trial judge who had audio-visual advantage of the witness unless it is satisfied that there are substantial and compelling reasons for disagreeing with the finding of fact (see *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1). It is not the function of the appellate court to make findings of primary facts (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

**[41]** In the instant case this court was satisfied that the appellant's appeal had merits as there were substantial and compelling reasons that the 1st learned trial judge had made erroneous findings of primary facts and that the decisions of both the learned trial judges were erroneous and ought to be set aside. This court found that there were serious gaps in the prosecution's case as four to five material witnesses who were essential for the complete narration or unfolding of the prosecution's case were not called.

**[42]** They were PW1's brother-in-law, Jaheer Husin, who was upstairs in the shop at the material time and who allegedly took PW1 and PW4 to the hospital, PW1's unnamed and unidentified worker mentioned in PW3's report who was also allegedly injured by the appellant and who was mentioned in the report lodged by PW3, and the two to three passers-by who had allegedly assisted PW1 to overpower and tie up the appellant. Apart from that the helmet which was allegedly worn by the appellant was also not produced in court.

**[43]** Both the learned trial judges failed to appreciate that PW1's and PW4's evidence was inherently incredible and improbable. Both of them admitted that they suffered serious injuries to three fingers of their right hand because they used their right hand to hold onto the blade of a brand new parang which the appellant was holding in his hand.

**[44]** At the same time PW1 had a modified iron pipe meant to be used for his personal protection concealed in the counter which separated him from the appellant. On seeing the appellant brandishing the parang he did not even use it to defend himself from being injured by the appellant's parang. He also did not shout or call out for assistance from PW4 and Jaheer Husin.

**[45]** Instead he left the safety and protection of the counter and went to the appellant and grappled single handedly with the appellant in order to wrest the parang from the appellant's hand. The conduct and behavior of PW1 were not only unreasonable but absurd. PW1's conduct could not be said to be the conduct of a person who had been put in fear of instant death or instant hurt or instant wrongful restraint by the act of the appellant brandishing the parang at him.

**[46]** On top of that when PW4 rushed out from the store room he saw the appellant and PW1 standing and quarreling at the counter. So the ridiculous and absurd behavior of PW1 and the material inconsistencies between his evidence and that of PW4 if they had been appreciated by the 1st trial judge would have caused her to rule that the appellant had succeeded in casting serious doubts in the prosecution's case even during the prosecution's case itself. It was unfortunate that both the learned trial judges had failed to appreciate in the prosecution's case that

A it was the appellant who had attempted to rob PW1 and in doing so had voluntarily injured PW1 and PW4 was heavily dependent on the sworn oral testimonies of PW1 and PW4.

**[47]** PW1 also agreed with the suggestion of the appellant's B learned counsel that he was bigger built than the appellant as the appellant was thinner than him. Yet by his sworn oral evidence it took about four to five persons to overpower the appellant. There was also evidence that PW1 had later used the modified iron pipe to hit the appellant but he failed because the appellant was C wearing a helmet.

**[48]** Yet when PW3 went to the shop he saw the appellant lying unconscious on the floor. He saw the parang with blood stains beside the appellant on the floor. He did not meet the worker whom PW1 claimed was also allegedly injured by the appellant's D parang. He also saw blood on the appellant's face. He agreed with the suggestion of the appellant's learned counsel that he did not know whether what had in fact transpired was a quarrel or a robbery between the appellant, PW1 and PW1's worker.

E **[49]** Neither PW1 nor PW4 explained the cause of the injuries to the appellant's face and what had happened to the appellant before he lost consciousness.

**[50]** PW6 also testified that the appellant's fingerprints were not F found on the parang. So even on the issue whether it was the appellant who had taken out the parang from inside his jacket and brandished it at PW1 was a doubt.

**[51]** Furthermore, neither PW1 nor PW4 lodged any police report G although they were both advised to do so by PW6, the Investigating Officer. PW6 also admitted that it was important for both PW1 and PW4 to lodge a police report in order to describe the sequence of events, *albeit*, briefly, which had transpired at the material time concerning the attempted robbery by the appellant and the hurt caused by the appellant to PW1 and PW4. H

**[52]** Although the contents of any report lodged by them do not constitute substantive evidence, they are important and relevant for showing consistency of the matters contained in their sworn oral testimonies in court bearing in mind that the appellant himself I was seriously injured and PW1 and PW4 also claimed that they

were seriously injured by the appellant. Hence, the contents of any reports lodged by them would have an important bearing on the credibility and reliability of their sworn oral evidence and, consequently, on the issue concerning whether they were witnesses of truth (see *Muthusamy v. PP* [1947] 1 LNS 71).

**[53]** PW6 also testified that his investigations showed that PW1 and PW4 suffered injuries when they grappled with the appellant. This is in direct contradiction to the sworn oral testimonies of PW1 and PW4 that they suffered injuries when they themselves held onto the blade of the parang knowing that the parang is a brand new parang and that the blade of the parang is the sharpest part of the parang. So how can the prosecution say that the appellant had voluntarily caused hurt to PW1 and PW4?

**[54]** The evidence regarding what the two witnesses told PW6 is hearsay and is not admissible as substantive evidence. But it is relevant to show inconsistencies in the statement of the two witnesses to PW6 and their sworn oral evidence in court so as to render their truthfulness suspect and, similarly, the credibility of their sworn oral evidence suspect. The learned trial judge failed to take this into consideration when arriving at her decision to call for the defence (see *Muthusamy v. PP* [1947] 1 LNS 71).

**[55]** The examination-in-chief of PW6 was also extremely brief. PW6 was either oblivious or indifferent to the fact that the appellant had suffered a fracture to his facial bone and subdural hematoma as he did not obtain the appellant's medical report from the hospital which treated the appellant even though the case that he was investigating was a medico-legal case.

**[56]** PW6 also did not record any statement from PW5 or to obtain PW5's comprehensive and detailed medical report concerning the injuries which he found on both of them. He was giving his evidence just basing on his memory and a medical report which was not produced and tendered as an exhibit when the incident took place some three years ago. During that period he would have seen countless other patients. He had not given a good reason why he was able to recall and remember the injuries suffered by the two witnesses and the nature of the treatment which he had given to them.

**[57]** PW6 had commenced his investigations based on the two police reports which were lodged by PW2 and PW3. In his cross-examination he agreed that there was another report which he described as the first information report (the "FIR") which was lodged by Jaheer Husin. But this report was not tendered.

**[58]** The 1st trial judge erred when she did not draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution for not producing the report in that if it had been produced it would be inconsistent with the sworn oral testimonies of PW1 and PW4.

**[59]** The investigations which were carried out by the Investigating Officer, PW6, were also shoddy and manifestly inadequate.

**[60]** Both the parang and the modified iron pipe were not sent to the chemist for examination and analysis to determine whether they had the DNA profiles of PW1, PW4, PW1's unidentified worker as well as the appellant on them. Samples of the blood stains on the floor of the shop were also not taken and sent to the chemist for examination and analysis to determine whether they had the DNA profiles of PW1, PW4, PW1's unidentified worker as well as the appellant.

**[61]** This court noted that there were also no photographs taken of the modified iron pipe, the parang and the sheath in order to allow the trial judge to make a comparison whether the items produced in court matched the items which were seized by PW3 and handed over to the IO. On top of that, PW6 admitted that he merely used liquid paper to mark the parang and the modified iron pipe. He also admitted that the marks had disappeared from the two items and he was merely identifying the two items based on his memory. So there was a doubt whether the two items were in fact the two items which PW3 had seized from the shop.

**[62]** Although this court is aware that the non-production of the weapon allegedly used to cause hurt to a victim by an accused person is not fatal to the prosecution's case, the possibility that the prosecution witnesses, in particular, civilian witnesses had fabricated evidence against the victim for reasons best known to themselves should always be borne in mind by a trial judge when evaluating their sworn oral evidence which has not been supported by independent witnesses.

**[63]** There was no explanation from PW6, let alone, a reasonable explanation, for his failure to instruct a police photographer to take photographs of the parang and the modified iron pipe. His omissions have left serious gaps in the prosecution's case. The gaps created a doubt whether the sworn oral testimonies of the prosecution witnesses concerning the use by the appellant of the parang, P1, in his attempt to rob PW1 were inherently credible or probable.

**[64]** Apart from the matters stated above, this court was of the view that, had the 1st trial judge scrutinised the prosecution's case carefully she would not have called the appellant to enter his defence. It was quite clear that the prosecution had failed to prove on a *prima facie* basis that the appellant had committed the offence as specified in the charge.

**[65]** Firstly, there was no evidence whatsoever let alone credible evidence that the appellant had demanded that PW1 hand over to him any movable property belonging to PW1 such as money or jewelry or other chattels as is mandated by s. 378 of the Penal Code.

**[66]** Secondly, there was also no evidence whatsoever let alone credible evidence that in making the demand the appellant had caused or attempted to cause to PW1 death or hurt or wrongful restraint or fear of instant death or instant hurt or instant wrongful restraint as is mandated by s. 394 of the Penal Code.

**[67]** It is trite law that the requirements of strict proof in a criminal case cannot be relaxed in order to bridge any material gap in the prosecution's evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. Therefore, the appeal must be allowed, the conviction quashed and the appellant acquitted and discharged (see the Federal Court case of *Sia Soon Suan v. PP* [1965] 1 LNS 165).

**[68]** Be that as it may, having heard the evidence adduced by the appellant in support of his defence, the 2nd trial judge erroneously found the appellant guilty and convicted him as per the charge.

**[69]** Had she considered the defence's case carefully against the backdrop of the prosecution's case and asked herself the question whether the explanation given by the appellant may reasonably be true she would have been satisfied that the defence had succeeded in casting a doubt on the prosecution's case.

**[70]** The appellant's defence that he suffered the injuries, to wit, skull fracture right, orbital roof, right vertex subdural hematoma, parietal scalp swelling and an abrasion wound over the left face, as set out in his medical report, D6, was not challenged by the prosecution.

**[71]** According to the appellant in his defence he had gone to the shop to buy cigarettes and not a pen as alleged by PW1. He explained that he did not need to buy a pen because he had about three or four pens inside a school bag which he was carrying with him.

**[72]** He also explained that he had the pens with him because he was working as a part time petition writer at the Kuala Lumpur Hospital in order to supplement his income and to provide financial assistance to his parents. He also explained that he had his school bag with him because he was studying and attending night classes at the Institut Teknologi Tun Abdul Razak for a Diploma in Business Administration.

**[73]** He denied that he had brought the parang with him to the shop and had done what PW1 said he had done with the parang.

**[74]** When he entered the shop he saw three or four big sized male Indians quarrelling. He could not understand what they were quarrelling about because they spoke in Tamil. He also saw a worker cutting and opening coconuts with a parang behind the counter. After paying for his purchase he walked out of the shop.

**[75]** Suddenly he was hit on his head from behind and he lost consciousness for four days. He did not see who hit him. When he recovered consciousness he found himself in the Putrajaya Hospital. Upon his discharge from the hospital he went to the Petaling Jaya Police Station to lodge a police report concerning the assault on him but he was not allowed to do so by the police on the ground that he had been accused of committing the offence as stated in the charge. The police told him that he could only give evidence in court.

**[76]** The 2nd trial judge failed to appreciate that the suggestion that was put to the appellant by the prosecution that the three or four men had left the shop as he walked into the shop supported the truth of the appellant's story. Instead she erroneously ruled that the defence was a bare denial.

**[77]** In his medical report he said that he was assaulted by some passers-by while he was walking at the roadside. This is substantiated by PW3's evidence that he saw blood on the appellant's face. It is also substantiated by PW1's evidence that two to three passers-by had overpowered the appellant and tied him up. PW1 and PW4 did not explain how the appellant was injured.

**[78]** So the defence version can be believed and accepted taking into account the facts and circumstances surrounding the case. Even if the 2nd trial judge did not believe the appellant's version of what transpired the 2nd trial judge ought to follow and apply the principle of law as enunciated in the classic case of *Mat v. PP* [1963] 1 LNS 82, and consider whether the defence, *albeit*, false had cast a doubt on the prosecution case. There was a misdirection which has occasioned a miscarriage of justice. Therefore, the appeal must be allowed, the conviction quashed and the accused acquitted and discharged.

**[79]** For completeness sake, this court shall deal with the sentence of eight years imprisonment and whipping of four strokes which was meted out to the appellant by the 2nd trial judge. Assuming for a moment that there was ample evidence to support the appellant's conviction, this court agreed with the submissions of the appellant's learned counsel that the sentence was manifestly excessive. The appellant was a first time offender. He had a good record. He himself had suffered injuries more serious than those suffered by PW1 and PW4 and the nature and extent of their injuries were also in doubt as stated earlier in this judgment. The evidence also clearly showed that it was PW1 and PW4 themselves who had held onto the sharp blade of the parang when there was no evidence to show that they were under any reasonable apprehension that they had to do that immediately in order to protect themselves from being injured by the appellant.

**[80]** In imposing any sentence the court must consider and apply the established principles of sentencing, to wit, retribution, deterrence, prevention and rehabilitation and to see which of them has the greatest importance (see *Re James Henry Sargeant*, per Lawton LJ as cited by Hashim Yeop A. Sani, in *PP v. Loo Choon Fatt* [1976] 1 LNS 102). The prime consideration in sentencing is always the public interest (see *R v. Kenneth John Ball* [1951] 35 Cr App 164). The court must also strike a balance between the interest of the public and the interest of the accused because the public interest is best served if the appellant can be induced to turn away from crime to honest living (see *PP v. Muthu Subramaniam Seeniservai* [2001] 7 CLJ 236).

**[81]** In the instant case this court was of the view that the public interest would have been served had the 2nd trial judge imposed upon the appellant a sentence of 2 1/2 years imprisonment to take effect from the date of the judgment.

**Conclusion**

**[82]** In that premise the appellant's conviction could not be sustained. Therefore, this court allowed his appeal, quashed his conviction and ordered that he be acquitted and discharged.